United Nations AT/DEC/1194

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 1194

Case No. 1289: HAILE Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Julio Barboza, President; Mr. Omer Youssif Bireedo; Mr. Dayendra Sena Wijewardane;

Whereas at the request of Jane Haile, a former staff member of the United Nations Children's Fund (hereinafter referred to as UNICEF), the President of the Tribunal, with the agreement of the Respondent, extended to 30 April 2003 the time limit for the filing of an application with the Tribunal;

Whereas, on 25 March 2003, the Applicant filed an Application containing pleas which read as follows:

"II. Pleas

7. With respect to competence and procedure, the Applicant respectfully requests the Tribunal:

...

(c) *to decide* to hold oral proceedings ...;

8. On the merits, the Applicant respectfully requests the Tribunal:

(a) *to rescind* the decision of the Secretary-General rejecting the Applicant's claims that she had suffered harm from, *inter alia*, the damage to [her] career and professional reputation as well as the failure of the Respondent to ensure a proper performance appraisal for her last three years of service;

(b) *to find and rule* that the Joint Appeals Board [(JAB)] erred as a matter of law and equity in failing to conduct a full and complete inquiry into

the facts and circumstances leading up to the Applicant's charges of harassment against her supervisor in 1997;

(c) *to find and rule* that the [JAB's] recommendation for three months' net base salary failed to provide appropriate and adequate compensation for the harm done to the Applicant for violation of her rights under the Staff [Regulations and Rules];

(d) *to award* the Applicant compensation in the amount of three years' net base pay for the actual, consequential and moral damages suffered by the Applicant as a result of the Respondent's actions or lack thereof and in light of the exceptional circumstances;

(e) *to award* the Applicant $500,000 in punitive damages for the failure of the Respondent to maintain a proper working environment and to take steps to prevent gender harassment as well as for the denial of fair consideration for re-assignment and promotion;

(f) *to award* the Applicant six months' net base pay for the unnecessary delays in adjudicating her claims;

(g) *to fix* pursuant to Article 9, paragraph 1 of the Statute and Rules, the amount of compensation to be paid in lieu of specific performance at three years' net base pay in view of the special circumstances of the case;

(h) *to award* the Applicant as cost, the sum of $7,500.00 in legal fees and $500.00 in expenses and disbursements."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 30 June 2003 and thereafter until 30 September 2003;

Whereas the Respondent filed his Answer on 30 September 2003;

Whereas the Applicant filed Written Observations on 30 December 2003;

Whereas, on 5 July 2004, the Tribunal decided not to hold oral proceedings in the case;

Whereas the facts in the case are as follows:

The Applicant joined UNICEF on 22 January 1982, on a fixed-term appointment for two years and ten days as a Regional Information Officer, Project Support Communication, Bangkok, at the P-4 level. Her appointment was subsequently extended and she was promoted. At the time of the events that gave rise to this Application, she had a permanent appointment and held the D-1 level post of Deputy Regional Director, Amman Regional Office.

In August 1997, the Applicant requested a period of special leave with full pay (SLWFP) with effect from 1 July 1998 until she could take early retirement from UNICEF. This request was subsequently approved.

On 5 December 1997, the Applicant's supervisor, the Regional Director, Amman Regional Office, completed her performance evaluation report (PER) for 1996. Under most categories, he rated her performance as "3" ("met most expectations, however, there is room for improvement"), and he provided extremely critical remarks, especially in the "General Comments" section of the report. Neither the Applicant nor her second reporting officer completed or signed the PER.

On 7 December 1997, the Applicant's supervisor (hereinafter referred to as former supervisor) left the service of UNICEF.

On 2 January 1998, the Applicant e-mailed the new Regional Director, informing her that she did not intend to sign her PER, which had been completed without discussion and which had reached her after her former supervisor had left the office. She stated that the PER had been "passed around the office" and placed in her personnel file. She concluded

> "This action ... is the culmination of almost two years of managerial harassment of which senior management in HQ have been informed on several occasions both verbally and in writing. I am therefore taking legal advice."

On 15 February 1998, the Regional Director responded, offering her two options: either the matter could be dropped, in view of the Applicant's decision to go on SLWFP until she could take early retirement, and all mention of the PER would be removed from her file; or, she could rebut it. In her reply of 17 February, the Applicant reiterated that she was seeking legal advice.

In April 1998, the Ombudsperson, Middle East and North Africa Regional Office, wrote to the Regional Director further to a meeting he had had with the Applicant and his review of a file she had compiled about treatment she had suffered at the hands of her former supervisor. While acknowledging that he had only heard one side of the story, he determined that she had "made a strong case, demonstrating that both by intent and through action, work related harassment took place" and recommended that "any grievances suffered be settled quickly [and] amicably between all concerned to avoid this issue going to litigation". He also recommended that UNICEF establish mechanisms to assist senior staff making claims of harassment.

On 27 April 1998, the Applicant wrote to the Executive Director, UNICEF, requesting administrative review of UNICEF's failure to address her charges of harassment, prejudicial treatment and abuse of authority by her former supervisor. The Applicant stated, inter alia, that she had been the victim of abusive behaviour, and had received a prejudicial

PER. The Deputy Executive Director, Operations, responded on 20 May that UNICEF had decided to investigate her allegations "through formal means" and had appointed an investigator. The Applicant was asked to submit a "report describing in detail the specific act or acts of harassment, abuse of authority and prejudicial treatment, and the circumstances under which they took place, attaching any relevant documentation". On 15 June, the Applicant provided UNICEF with documentation as well as the names of persons she believed should be contacted. She expressed concern about the proposed investigator who, she contended, was "personally and professionally acquainted" with the accused, and also informed the Deputy Executive Director that she had decided to leave UNICEF.

On 30 June 1998, the Director, Division of Human Resources, wrote to the Applicant, informing her that, in light of her concerns about the proposed investigator, a new independent investigator would be appointed.

On 5 August 1998, the Executive Director advised the Applicant's former supervisor that the PER he had prepared for the Applicant was invalid. She noted that UNICEF had tried to do its best to resolve the differences he and the Applicant had through informal means but that, as senior managers, they were responsible for their actions.

On 26 February 1999, the Applicant informed UNICEF that, unless she received the investigator's report by 31 March, she would file an appeal. She was advised on 3 March that the investigator would circulate a draft report to both parties by 31 March. On 30 March, the Applicant and her former supervisor were provided with the draft report as well as statements from the witnesses. They were advised that comments should be submitted within two weeks, and that the report would be finalized within two weeks of receipt of their comments. The Applicant and her former supervisor submitted their comments on 19 and 23 April, respectively.

On 3 June 1999, the Executive Director transmitted a copy of the final investigation to both parties. The investigator had concluded that the allegations were unsubstantiated or "not proven". He noted, "some [harassment] was indicated but [it was] not indisputably confirmed". The Executive Director stated that she had decided to accept the investigator's conclusions and that, while the Applicant might have suffered "certain indignities and personal frustrations", the record neither amounted to, nor justified, the serious charge of harassment. She recognized that both parties felt "there is more that senior management at New York Headquarters could have done under the circumstances" but noted her belief that senior management "did indeed try to help, encouraging the both of you to co-operate and to try to resolve your differences amicably".

On 20 July 1999, the Applicant lodged an appeal with the JAB in New York.

On 9 October 1999, the Applicant separated from service.

The JAB adopted its report on 9 May 2002. Its considerations and recommendation read, in part, as follows:

> "***Considerations***
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> 66. The Panel agreed that it was not called upon to consider whether or not Appellant had been harassed. The major focus of its consideration would be whether or not UNICEF had responded in an appropriate, adequate and timely fashion to her complaints of mistreatment by [her former supervisor].
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> ...
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> 70. ... The Panel could not ascertain when the conflict first came to the attention of UNICEF Headquarters ... [but] ... [a]t the latest, the situation was brought forcefully to Headquarters' attention in May 1997. Although UNICEF could have acted – admonished, reprimanded, disciplined or reassigned – one or both of the adversaries, it did nothing for seven months ... In fact, by its own admission, it acted only ... 'as soon as Appellant filed a formal appeal' in April 1998. *In the opinion of the Panel, simply telling these two to sort it out themselves was not good enough. By allowing the situation to fester over a number of months, UNICEF administration failed in its responsibilities to maintain a healthy working environment.* In sum, UNICEF demonstrated a lack of due diligence in managing these two very human resources.
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> 71. Finally, the Panel considered the final statement of the appeal concerning Appellant's performance evaluation. The Panel noted that the report ... to which Appellant had objected was not on her file and that she had been placed on special leave with full pay from 1 July 1998 until her retirement. The Panel concluded that her career had suffered no harm from the lack of PER for the years 1996 through 1998.
>
> 72. During its discussions, the Panel noted that Appellant's [case] was lent further substance by Respondent's remark 'we do not have a policy on harassment *per se* in the workplace' ... While it is outside the Panel's terms of reference to make recommendations regarding such a [matter], the Panel does feel it appropriate to remark that, given the diversity of individual and cultural backgrounds represented by the UNICEF staff, the conflict between Appellant and [her former supervisor] could not have been the first of its kind, nor will it be the last. UNICEF would, therefore, be well advised to devise a mechanism, informed by conflict resolution techniques, to deal with them.
>
> ***Recommendation***
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> 73. The Panel recommends to the Secretary-General that, for its failure to respond to Appellant's complaints in an adequate and timely fashion, UNICEF pay her an indemnity equivalent to three months' net base salary at the time of her retirement."

On 2 December 2002, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed her that the Secretary-General had decided to

accept the JAB's conclusions and, "in accordance with its unanimous recommendation, has decided that UNICEF pay [her] an indemnity equivalent to three months' net base salary at the time of [her] retirement".

On 25 March 2003, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The harassment suffered by the Applicant destroyed her career with UNICEF.

2. The JAB erred in not considering the issues of harassment and discrimination and made serious errors in its interpretation and conclusions.

3. The Applicant is entitled to compensation for the long delays in investigating and adjudicating her case.

Whereas the Respondent's principal contentions are:

1. The Applicant's career and professional reputation have not been damaged by the Respondent's actions.

2. The consideration of the case by the JAB was not marred by error.

3. The Applicant was adequately compensated for the failure to respond to her complaints in a satisfactory fashion.

The Tribunal, having deliberated from 5 to 23 July 2004, now pronounces the following Judgement:

I. This case concerns allegations lodged by the Applicant that she suffered harassment which destroyed her career with UNICEF. In addition, she contends that the JAB erred in failing to consider the issues of harassment and discrimination, and made serious errors in its interpretation and conclusions.

II. The Applicant joined UNICEF in Bangkok in 1982, at the P-4 level. In 1999, she separated from service after a lengthy period on special leave with full pay (SLWFP), prior to which she had held the D-1 position of Deputy Regional Director in Amman.

III. The Applicant claims that the JAB failed to perceive the full extent and deleterious effects of ongoing harassment and discriminatory treatment she suffered at the hands of her former supervisor. She asserts that this behaviour not only adversely affected her career, but

also violated her fundamental right to a proper working environment. In support of her claim, she makes a series of allegations, including that, after a delay of one year, her former supervisor partially completed her PER immediately prior to his separation from service and that this highly critical document was both circulated through the office and placed in her Official Status file, despite the fact that it had not been finalized. Other specific instances to which she alludes include the following:

- upon her return from assignment in Beirut, her former supervisor made it clear to her that he did not want her to work in Amman and refused to discuss her assignment with her;
- her signature authority was removed;
- previously approved missions were cancelled without her being informed;
- her former supervisor attacked her professional reputation at the Senior Staff Review and in Global Management Team meetings, amongst others; and,
- he publicly discussed the potential abolition of her post, in her absence and without any prior discussion.

IV. In response to her formal allegations, the Respondent appointed a mutually agreed upon investigator to look into the matter. The investigator concluded in his report that the allegations of injustice due to the conclusions in her PER and abuse of authority were not proven; that her claim that she was prevented from functioning effectively by the creation and continuation of a hostile environment was not sustainable; and, that there was no evidence that she was forced into taking SLWFP. He concluded that "some" harassment was indicated but that, given the conflicting records and statements of witnesses, it was not indisputably confirmed.

V. The JAB, in turn, focused its consideration on whether or not UNICEF had responded in an appropriate, adequate and timely fashion to the Applicant's complaint of harassment. It found that UNICEF had failed in its responsibility to maintain a healthy working environment and added that "UNICEF demonstrated a lack of due diligence in managing these two very human resources". Insofar as the Applicant's PER was concerned, the JAB noted that it was not in her file and, in view of the fact that she had been on SLWFP until her retirement, her career had suffered no harm from the lack of PER for the years 1996 through 1998.

VI. Insofar as the PER is concerned, the Tribunal agrees with the JAB that, despite the inappropriate actions of her former supervisor with respect to her PER, the Applicant was not harmed, because the offending PER was withdrawn from her file and she was on SLWFP - which had been approved, *at her request*, prior to the completion and circulation of her PER - until her retirement.

VII. The Tribunal notes the finding of the JAB that UNICEF failed in its responsibilities to maintain a healthy working environment and that it demonstrated a lack of due diligence i managing these two senior officials. Whilst it could have admonished, . primanded, disciplined or reassigned one or both of the staff members, it did nothing for seven months. In a similar case, the Tribunal found that "while t Administration took a number of steps to address the Applicant's complaint, they did not take the necessary measures to contain the problem or its serious negative impact on the two staff members involved as well as the work of the Department" and that "[u]nder the circumstances, ... the Respondent should have reassigned either the Applicant or her supervisor to another department". (See Judgment No. 1043, *Mink* (2002).)

In the instant case, both the Ombudsperson and the JAB recommended that UNICEF establish some form of conflict resolution mechanism, and the Tribunal can only agree. The Tribunal recalls its Judgement No. 560, *Claxton* (1992), wherein it held that the Organization "has strong interests in protecting staff rights, as well as in protecting itself against the consequences of their abrogation through misconduct by officials". In the circumstances of this case, however, the Tribunal finds that the three months' net base salary paid by the Organization upon the recommendation of the JAB for UNICEF's "failure to respond to [her] complaints in an adequate and timely fashion" is sufficient compensation for the procedural shortcomings.

VIII. The JAB proceeded on the basis that it ought not determine whether the Applicant had been harassed. The Tribunal concurs that the normal role of an administrative review body would be to perform procedural review rather than investigate the original claims itself. However, in this case, the investigator, who appears to have initiated a neutral investigation into the conduct of both parties, seemed unaware that he was to be the ultimate decision-maker on the factual matter of harassment. Indeed, he stated that there can be "no definite conclusions at this stage" and specifically referred to "future judicial review". The implication is that the investigator was under the impression that the investigation would be continued at some later date. Accordingly, the Tribunal felt it appropriate to consider the

allegations - and the underlying situation - from the files before it, the various submissions of the parties and, in particular, the investigator's report.

The Tribunal has taken account of the maltreatment and harassment the Applicant suffered at the hands of her former supervisor. Whilst it appears from the investigation report that both parties bore some responsibility in the escalation of hostilities, and concomitant polarization of their staff, which must have adversely affected the morale and functioning of the office at large, the Applicant's claims do appear to have merit. The unfair treatment and harassment to which she was subjected was amplified by one of the witness statements received by the investigator: the staff member in question witnessed an overt marginalization of the Applicant and a radical reduction in roles and responsibilities. He stated that she lost programmme monitoring functions and was also relieved of the supervision of regional technical advisers and Programmme Officers; that she was permitted no decision-making powers but that her role was given to a consultant.

The investigator concluded in his report that there are degrees of harassment and, on balance, it appeared that a form of managerial harassment by the Applicant's former supervisor took place, albeit "not of a very high order". He concluded "[a]s harassment goes it was not particularly vicious or career shattering, spasmodic rather than continuous ... It was unworthy of high office and was deserving of a second rebuke from the Executive Director comparable in severity to her earlier one." The Tribunal is inclined to take a more serious view. In all of the circumstances of the case, the Tribunal finds that the Applicant endured harassment from her former supervisor meriting compensation from UNICEF.

IX. The Tribunal observes from the facts of the case, however, that the Applicant both met with the Ombudsperson and filed her request for administrative review several months after her former supervisor left the office. It was surprised by this delay as, if she genuinely felt harassed and that her position was being undermined and her career being damaged, she could have initiated proceedings much earlier. Had she done so while her supervisor was still a staff member, the process of investigation would have been facilitated and UNICEF would have been in a better position to respond to her complaints in a timely and comprehensive way. In this regard, the Tribunal has taken account of the skeptical tone of the investigator in stating as follows:

> "[The Applicant's former supervisor's] procedural lapses were sufficient to open a window of opportunity for [the Applicant] to make charges of management harassment against him and she seized upon it after she had secured her special leave with full pay, leading to early retirement, presumably with full terminal benefits."

In addition, the Tribunal is not convinced that the Applicant's career was damaged. No staff member has the right to promotion, and the circumstances of the case are such that it is clear that the Applicant's own judgement and professionalism had been called into question in the investigation report as well as on other occasions. The investigator refers to both the Applicant and her former supervisor as "combative people, each bitterly convinced of the perfidy of the other's charges and apparently unaware of any of their own inadequacies or failings which might have been contributory to their dispute", and concludes that "neither party emerges ... with records or reputation intact". Moreover, the Tribunal notes that the Applicant declined an opportunity to be reassigned to Moscow, which would have provided her with an opportunity to continue her career away from Amman, and that she chose to retire from UNICEF even after her former supervisor left the service.

The Tribunal has considered these factors when determining the amount of compensation to be awarded in accordance with paragraph VIII above.

X. In view of the foregoing, the Tribunal:

1. Orders that the Applicant receive compensation of US$ 10,000; and,
2. Rejects all other pleas.

(*Signatures*)

Julio **Barboza**
President

Omer Youssif **Bireedo**
Member

Dayendra Sena **Wijewardane**
Member

Geneva, 23 July 2004

Maritza **Struyvenberg**
Executive Secretary